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Before the
Federal Communications Commission
Washington, D.C. 20554

JAN 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television)	
Fixed Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

COMMENTS OF NEW JERSEY TELEVISION CORPORATION

New Jersey Television Corporation ("NJTV"), by its attorneys, hereby submits its comments in response to the *Notice of Proposed Rulemaking*, FCC 97-397, released November 26, 1997 ("*NPRM*") in the captioned proceeding.¹

* * *

These Comments urge the FCC to clarify the relationship between Sections 307(b) and 309(j) of the Communications Act. In particular, in the event that more than one community of license is proposed among competing applicants for a given channel, a threshold consideration should be which community is more deserving of the new service. The presence of that issue either (1) should set this class of cases apart as not subject to auctions, or (2) if auctionable, such

¹ 62 Fed. Reg. 65392 (Dec. 12, 1997).

cases should include a Section 307(b) preference where such a preference is established under controlling precedent.

A case that illustrates the need for this clarification involves NJTV's pending application for a new low power television station on Channel 42 at Cherry Hill, New Jersey. Competing applicants have applied for the same frequency, but propose its use in a Philadelphia, Pennsylvania. In various pleadings before the Commission, NJTV has urged that Section 307(b) requires selection of a permittee for Channel 42 in New Jersey, rather than Philadelphia, which already has abundant local service. The Commissioners had not had the opportunity to address those pleadings when the auction legislation was enacted.

Section 307(b) provides that "the Commission shall make . . . a fair, efficient, and equitable distribution of radio service" among "the several States and communities. . . ." Over the years, this statute has been implemented by the consistent FCC policy of granting determinative Section 307(b) preferences to undeserved communities. *See generally, American Family Association*, 1997 FCC LEXIS 969 (Feb. 24, 1997) ("The respective proposals are for different communities and would serve different areas. Thus one proposal may receive a decisive preference based on the comparative need for the proposed new services. Consequently, it will be necessary to determine pursuant to Section 307(b), . . . which of the proposals would best provide a fair, efficient and equitable distribution of radio services"); *Positive Alternative Radio, Inc.*, 1997 FCC LEXIS 962 (Feb. 24, 1997); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943) (describing goal of Act to "secure the maximum benefits of radio to all the people of the United States"); *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 359-62 (1955) (describing Section 307(b) goal "to secure local means of expression").

Indeed, the extent to which New Jersey has been neglected in past FCC allocations decisions has been well documented. *See, e.g., Notice of Proposed Rulemaking* in BC Docket 80-719, FCC 80-666, November 6, 1980; *New Jersey Television Service*, 58 FCC 2d 790 (1976). The Court of Appeals has held that “local transmission service bestows such important benefits that we have consistently interpreted Section 307(b) virtually to ensure an applicant for first local service preference over on who proposes merely to compliment pre-existing local operations.” *Pasadena Broadcasting Co. v. FCC*, 555 F.2d 1046, 1050-51 (D.C. Cir. 1977).

Congress plainly envisaged the balanced implementation of Section 307(b) and the new auction legislation. Section 309(j)(6) of the Act -- which address “Rules of Construction” in the auctions context -- states: “Nothing in this subsection, or in the use of competitive bidding, shall -
- (A) alter spectrum allocation criteria and procedures established by the other provisions of this Act; (B) limit or otherwise affect the requirements of . . . Section[] 307 . . . of this Act”

Given the interpretation that the FCC and the courts have accorded Section 307(b), as well as Congress’ explicit notice in the Act that “nothing . . . in the use of competitive bidding” should affect the requirements of Section 307(b), it should be clear that Section 307(b) determination must be a threshold issue in any licensing scheme, whether by hearing, lottery or auction.

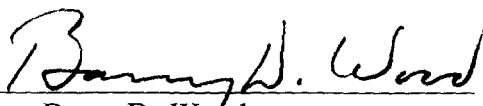
As shown above, Congress accorded Section 307(b) status sufficient to ensure that “nothing” in the auctions statute or rules, should limit the requirements of Section 307(b). Therefore, the Commission would be within its authority to treat Section 307(b) cases as a non-auctionable class except where multiple applicants proposed service to the community most deserving of service under Section 307(b).

Even if the FCC decides that these cases are subject to auctions, the new rules must, at a minimum, include a place for a Section 307(b) preference in any auction scheme. Only by that means can the "balance, completeness, and structural integrity," *Brown v. General Services Administration*, 425 U.S. 820, 832 (1976), of the statute be ensured. *See also, U.S. v. Turkette*, 101 S.Ct. 2524, 2525 (1981) (construction of statute must "not render any portion of the statute superfluous [or] create any structural incongruities within the statute's framework").

For the foregoing reasons, the FCC should take care to treat cases where Section 307(b) considerations are significant as distinct from the ordinary class of broadcast frequencies subject to auction.

Respectfully submitted,

**NEW JERSEY TELEVISION
CORPORATION**

By: 
Barry D. Wood
Ronald D. Maines

WOOD & BRINTON,
CHARTERED
Suite 900
2300 M Street, N.W.
Washington, D.C. 20037
(202) 293-5333

Her Attorneys

Dated: January 26, 1998